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In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-53a) is reported at 586 F.2d 756. The opinion of the district court (Pet. App. 54a-79a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 80a) was entered on August 8, 1978. A petition for

rehearing was denied on December 6, 1978 (Pet. App. 81a-82a). On February 27, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including April 5, 1979 (A. 81). The petition was filed on that date and granted on June 11, 1979 (A. 82). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether public lands withdrawn from all forms of private appropriation and placed within a federal grazing district may be selected by a state in lieu of lost school-grant lands without first being classified as available for that purpose by the Secretary of the Interior pursuant to his discretionary authority under Section 7 of the Taylor Grazing Act.

2. Whether the Secretary, in the exercise of such discretion, may decline to classify as open to selection lands which are "grossly disparate" in value to the lost school lands.

STATUTES INVOLVED

The relevant statutes are:

1. Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109;

2. Sections 2275 and 2276 of the Revised Statutes, as amended, 43 U.S.C. 851-852; and

3. Sections 1 and 7 of the Taylor Grazing Act of June 28, 1934, 43 U.S.C. 315 and 315f.

These provisions are reproduced in the Appendix, *infra*, 1a-11a.

STATEMENT

1. As the United States expanded in the 19th century and new states were created out of areas that had previously been federal territories, Congress granted the new states certain lands for school purposes. The states agreed to hold and administer these lands under a permanent trust for the benefit of the local public school system (Pet. App. 13a, 70a). In particular, when Utah was admitted to the Union in 1896, the new state was granted four numbered sections in every township "for the support of common schools." See Section 6 of the Utah Enabling Act of 1894, ch. 138, 28 Stat. 109.[1]

In making these land grants, Congress recognized that in some instances the designated numbered sections, the so-called "grants in place," had already

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[1] The amount of school land granted to each state varied. Utah, Arizona, and New Mexico, in part because of the large desert areas contained in those states, were the only ones to receive four sections in every township throughout the state. Ohio, the 17th state, was the first to receive a school land grant. Congress granted it one section in every township. 2 Stat. 175. Most states received one section per township, until Congress established a government for the Territory of Oregon in 1848. The Organic Act for Oregon, 9 Stat. 330, reserved two sections in every township for school purposes. The first state that actually received a school grant of two sections per township was California, the 31st state, in 1853. 10 Stat. 246. The promise of two sections to Oregon was fulfiled when Oregon became the 33rd state in 1859. 11 Stat. 383. Most states admitted to the Union in the second half of the 19th century received two sections in every township for school purposes. See generally P. Gates, *History of Public Land Law Development* 288-318 (1968).

been "sold or otherwise disposed of" under the authority of other federal statutes (*e.g.*, the Homestead Act of 1862, 12 Stat. 392) and were therefore unavailable to the states for school purposes. Accordingly, it was provided that, in such circumstances, the affected state could select other federal lands equivalent to the lost grants in place.

Section 6 of the Utah Enabling Act, like several other statutes offering admission to a new state, declared that these indemnity or in-lieu selections should be made "in such manner as the [state] legislature may provide, with the approval of the Secretary of the Interior * * *." State acquisitions of land through indemnity selection are also regulated by general statutes enacted at various times both before and after Utah joined the Union. See Rev. Stat. 2275 and 2276, as amended, 43 U.S.C. 851 and 852; Sections 1 and 7 of the Taylor Grazing Act, 43 U.S.C. 315 and 315f. At issue in the present case is the extent of the discretion that the Secretary of the Interior may exercise in approving indemnity selections under the statutory scheme that Congress has established.[2]

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[2] Because the western states are the ones most recently admitted to the Union and because Utah and Arizona are two of the three states that received particularly large grants, the remaining indemnity selection rights are concentrated in seven western states. Utah and Arizona alone hold nearly 70% of the outstanding indemnity rights. The approximate number of acres still to be selected in each state (and thus the approximate number of acres potentially affected by this lawsuit) is as follows: Arizona, 170,000 acres; California, 108,000 acres; Colorado, 17,000 acres; Idaho, 27,000 acres; Montana, 22,900 acres; Utah, 225,000 acres; and Wyoming, 1,100 acres.

2. Between September 1965 and November 1971, Utah filed with the Secretary indemnity selections covering approximately 157,000 acres (Pet. App. 56a-61a).[3] The Secretary and the State engaged in informal negotiations directed toward enabling the State to select indemnity lands in large blocks, but the Secretary did not act on any of the selections actually filed. The passage of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, generated further delay, because of the possibility that the Secretary's approval of Utah's selections would be deemed a "major Federal action" requiring preparation of an environmental impact statement.

Meanwhile, in 1973 and early 1974, while Utah's indemnity selections were pending, the Secretary developed a prototype oil-shale leasing program to facilitate testing of alternative methods of extracting oil from shale deposits.[4] The Secretary announced that he would conduct public bidding for several leases, including two in Utah. Each Utah lease was to cover a tract of 5,120 acres, and all the land cov-

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[3] All the land selected by the State is located in Uintah County. Most of the 194 parcels designated are 640-acre survey sections or parts of such sections. The only exceptions are the final three selections, filed in November 1971, each compromising approximately 11,000 or 12,000 acres.

[4] A description of the leasing program was published in the Federal Register. See 38 Fed. Reg. 33186 (1973); 39 Fed. Reg. 7475 (1974); 39 Fed. Reg. 11208 (1974).

ered by the two leases was located within the areas selected by Utah in satisfaction of its outstanding indemnity rights (Pet. App. 61a-62a).

In January 1974, the Governor of Utah wrote to the Secretary and stated that Utah "did not wish to interfere with the letting of these leases under the proposed bidding procedure" (A. 60). The Governor promised that "the pendency of [Utah's] selection application would not be construed as a cloud on the title of these tracts and that the State of Utah would recognize the right of the lessee under any lease granted on these tracts by the U.S. Government" (*ibid.*).

In his return letter, dated February 14, 1974, the Secretary stated (A. 61):

> As you know, the Department of the Interior has not yet acted upon the State's [indemnity] applications. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.
>
> In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above-mentioned policy in that adjudication.

The following day a similar letter was sent by the Solicitor of the Department of the Interior to Utah's Attorney General (A. 63).

On February 22, 1974, the United States and Utah entered into an agreement concerning the proposed oil-shale leases (A. 64-66). The agreement reflected the Governor's commitment that the State would not attempt to obstruct the leasing program and would abide by the terms of any leases issued, in the event the State "is or becomes vested with any right or interest in the lands or minerals contained within [the leased tracts]" (A. 65).

3. The State filed the present action on March 4, 1974.[5] The State's complaint sought title to the acreage selected or, alternatively, an order directing the Secretary to approve or disapprove the State's selections without reference to the disparate values of the selected lands and the lost grants in place. In due course, the parties entered into a stipulation identifying the contested issues of law in the case: (a) whether the State's selections can be effective unless the identified lands are first classified by the Secretary, under Section 7 of the Taylor Grazing Act, as suitable for satisfaction of school indemnity selection

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[5] The prototype oil-shale leases were awarded and executed soon after this action was filed (Pet. App. 62a).

rights; and, if not, (b) whether, in making the required classification, the Secretary may consider the "comparative values" of the selected lands and the lost sections; and (c) whether such a classification constitutes a "major Federal action" under Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), with the possibility that an environmental impact statement would have to be prepared (A. 31). Both the Secretary and the State moved for summary judgment.[6]

The district court ruled in favor of the State (Pet. App. 54a-79a). The court directed the Secretary to complete a "ministerial, administrative adjudication" resulting in "a determination as to whether those selection lists [comprising the disputed acreage] are in factual compliance with the requirements of 43 U.S.C. 852, and to refrain from applying any measure of comparative or disparate value between the base lands and the selected lands" (Pet. App. 77a).[7]

[6] In addition, the State sought an order requiring the Secretary to pay the receipts from the two prototype oil-shale leases into the registry of the district court during the pendency of this case. The district court granted this relief and instructed its clerk to deposit equal portions of the impounded leasing receipts in four Salt Lake City banks, the receipts then to be invested by the banks in 90-day Treasury bills. On appeal, those orders were affirmed. When the petition for a writ of certiorari was filed in April 1979, the accumulated lease revenues exceeded $72 million. For the reasons stated in the petition (Pet. 7 n.4), the Secretary did not seek review of the propriety of the district court's impoundment of the lease receipts.

[7] The judgment originally provided that this administrative adjudication should be completed no later than December 15, 1976. In October 1976, however, the district court stayed this requirement pending appeal to the court of appeals (see A.15). To date, neither court has entered any subsequent order setting a new deadline.

The district court further held that classification under Section 7 of the Taylor Grazing Act was not required with respect to lands selected by the State under Section 852, and that the Secretary's contrary regulations were "void." Finally, the court concluded that the National Environmental Policy Act was inapplicable (Pet. App. 74a).

On appeal by the Secretary, the Tenth Circuit affirmed the district court's judgment in its entirety. The court of appeals stated that the school land grant statutes must be treated as "*special acts* completely separate and apart from all other public land grant enactments * * * and given special, independent treatment" (Pet. App. 40a; emphasis in original). The court stressed that the purpose of these acts was "*to create a binding permanent trust which would generate financial aid to support the public school systems of the 'public land' states*" (Pet. App. 13a; emphasis in original). For this reason, the court concluded, "the solemn bilateral agreement between the United States and the 'Land Grant' State of Utah" conferred upon Utah the "unqualified, unambiguous *right* * * * to select 'in lieu' school indemnity lands which are 'mineral in character' for the specific school lands granted which are 'mineral in character' but lost to the State" (Pet. App. 48a; emphasis in original). The court held that the State's right of selection overrides the Secretary's discretion under Section 7

of the Taylor Grazing Act to classify lands as open to selection. The court ruled first that Section 7 is inapplicable to the Secretary's processing of state indemnity selections (Pet. App. 39a). Alternatively, the court decided that, in this context, Section 7 classification is not discretionary and may not take into account the comparative values of "base" and selected lands (Pet. App. 49a).

SUMMARY OF ARGUMENT

When Congress first provided for the replacement of lost school lands in 1826, it directed the Secretary of the Treasury to select the tracts that should be granted to the states in lieu of the unavailable numbered sections. The Secretary of the Interior succeeded to this authority in 1849, when Congress created the Department of the Interior.

Although Congress never expressed any intention to deprive the Secretary of full discretionary control over the selection of replacement tracts, compilation of the Revised Statutes of 1874 resulted in the omission of all reference to the Secretary in Sections 2275 and 2276, the revised and consolidated version of earlier statutes governing the selection of replacement lands. Explicit mention of the Secretary's role in the selection process was not restored in 1891 when Sections 2275 and 2276 were amended to provide for initial state selection of in-lieu lands. The Secretary's continuing participation in such matters was reflected, however, in a variety of contemporary sources, not least of which were the numerous state enabling

acts, including Utah's, that required the Secretary's approval for the perfection of state indemnity selections.

In two cases decided in 1921, this Court held that the Secretary's task in reviewing in-lieu selections filed by the states was essentially a ministerial one, limited to a determination of whether particular selections conformed with the requirements of Sections 2275 and 2276. *Payne* v. *New Mexico*, 255 U.S. 367 (1921); *Wyoming* v. *United States*, 255 U.S. 489 (1921). After *Payne* and *Wyoming*, the Secretary was no longer permitted to withhold his approval solely because he believed that a state's selection would not serve the public interest.

The passage of the Taylor Grazing Act in 1934 marked a return to greater federal control over the public lands. The Act authorized the Secretary to establish grazing districts from unappropriated and unreserved public lands and thereby to withdraw the lands included within such districts from "all forms of entry or settlement" (other than grazing in accordance with a permit obtained under Section 3 of the Act or homesteading on land that the Secretary had specifically classified, under Section 7 of the Act, as suitable for the production of agricultural crops). In particular, land placed in a grazing district, by virtue of its withdrawal from "all forms of entry or settlement," became unavailable for state selection in lieu of lost school lands.

Shortly after the Taylor Grazing Act was passed, President Roosevelt, in an exercise of his authority

under the Pickett Act of 1910, issued Executive Order No. 6910, temporarily withdrawing all unreserved and unappropriated public land in 12 western states, including Utah, from "settlement, location, sale, or entry," and reserving such land for classification, "pending determination of the most useful purpose" to which such land might be put under the Taylor Grazing Act. The Executive Order left virtually no public lands available for indemnity selection in lieu of lost school lands in the 12 named states.

Several months later, in June and July 1935, the Secretary of the Interior created and then expanded Grazing District No. 8 in northeastern Utah. This grazing district contained and still contains all the land covered by the Utah indemnity selections at issue in this case.

Meanwhile, Congress had come to recognize that Executive Order No. 6910 left too little opportunity, in the 12 affected states, for entry onto public lands for purposes other than grazing or homesteading. Accordingly, in 1936, Congress amended Section 7 of the Taylor Grazing Act so that any lands withdrawn under Order No. 6910 or through placement in a grazing district would become available for other purposes whenever the Secretary, in response to an application for "entry, selection, or location," exercised his discretion to classify the withdrawn lands as suitable for the purpose stated in the application. The legislative history of the amendment to Section 7 demonstrates that Congress wished to permit the

states to acquire withdrawn lands through indemnity selection, if the Secretary classified the selected lands as proper for that purpose.

The Secretary's regulations and administrative practice have consistently followed this interpretation of the Taylor Grazing Act and Executive Order No. 6910. The Secretary's view of his discretionary classification authority under Section 7 is entitled to substantial weight as the considered judgment of the Executive Branch officer entrusted with the responsibility for administering the public domain. Moreover, the discretion provided by Section 7 is necessary to enable the Secretary effectively to accommodate the competing aspects of the public interest frequently involved in decisions concerning the use and disposition of public lands.

In 1958 Congress authorized the states to select mineral lands to replace lost school lands that were mineral in character. Before this amendment of Section 2276, the states were prohibited from selecting mineral lands in lieu of lost school sections, regardless of the character of the original grants in place. The court of appeals in the present case has suggested that under the amended statute, the Secretary is obliged to approve Utah's indemnity selections of mineral land, if he determines that the lost school sections were also mineral. This is incorrect. The 1958 amendments did not affect the Secretary's discretion under Section 7 of the Taylor Grazing Act; they merely expanded the set of public lands among

which the states may choose in making their in-lieu selections. Indemnity selections of mineral lands, like all other indemnity selections, are subject to the Secretary's classification authority under Section 7. The legislative history of the 1958 amendments and of additional amendments to Sections 2275 and 2276 enacted in 1960 confirms that Congress intended no change in prior practice. The rule remains that a state indemnity selection "can be consummated only if the land selected is classified by the Secretary of the Interior as proper for acquisition in satisfaction of an outstanding lieu right." H.R. Rep. No. 2110, 86th Cong., 2d Sess. 2 (1960).

II

In adopting a "grossly disparate value" policy to govern indemnity selections of mineral lands, the Secretary properly exercised his discretion under Section 7. Congress' stated goal in enacting the 1958 amendments to Sections 2275 and 2276 was to insure that the states would receive a fair cross section of land values as a result of their original school grants. The Secretary's policy helps to achieve that goal. States that have lost mineral lands may select other mineral lands as a replacement, but the substitute sections must be roughly equivalent in value to the lost grants in place. The Secretary's policy is thus designed to produce a distribution of mineral lands that fairly approximates what would have occurred had some of the original numbered school sections

not been lost to the states. The states are precluded only from using the indemnity selection program to obtain a windfall through selection of highly valuable public mineral lands in exchange for lost mineral sections of substantially less value.

The Secretary has adhered steadily to the "grossly disparate value" policy since at least 1965, and it is a reasonable guideline for the exercise of his classification authority under Section 7. Congress is aware of the policy's application to the Utah indemnity selections at issue in this case and has indicated its approval.

ARGUMENT

I. IN MAKING INDEMNITY SELECTIONS OF PUBLIC LANDS IN LIEU OF LOST SCHOOL-GRANT LANDS, STATES MAY SELECT LAND WITHIN FEDERAL GRAZING DISTRICTS ONLY IF THE SECRETARY OF THE INTERIOR CLASSIFIES THE LAND AS AVAILABLE FOR THAT PURPOSE, IN THE EXERCISE OF HIS DISCRETIONARY AUTHORITY UNDER SECTION 7 OF THE TAYLOR GRAZING ACT

Resolution of the central question presented in this case requires the Court to review a complex amalgam of statutes, executive orders, judicial decisions, and administrative interpretations bearing on the state indemnity selection program. The current legal situation cannot be fully understood without a review of the historical antecedents of the statutory authority that the states now enjoy to select mineral lands in certain circumstances. Once the significant events of the past 150 years have been identified and described, the basis of the Secretary's discretionary authority to classify lands available for indemnity selection will be readily apparent. Accordingly, we present a chronological account of the development of the indemnity selection program and the Secretary's role in the selection process.

A. The Congressional Decision to Appropriate Public Lands In Lieu of Unrealized School Grants

Long before Utah joined the Union, Congress provided for the replacement of school-grant lands that, for one reason or another, were unavailable to the states. States entering the Union during the first

half of the 19th century typically were granted a single numbered section, Section 16, in each township for the support of schools. Fractional townships, however, frequently lacked Section 16 and, as a result, the total school grant to each state proved smaller than Congress had intended. In 1826, Congress sought to remedy this problem by appropriating another tract of land for each fractional township that lacked a Section 16. 4 Stat. 179; 2 Cong. Deb. 2575-2576 (1826). The Secretary of the Treasury was directed to select the replacement tracts from any unappropriated public land within the land district encompassing the deficient township. (When Congress created the Department of the Interior in 1849, the Secretary of the new department assumed "all the duties in relation to the General Land Office * * * [previously] discharged by the Secretary of the Treasury" (9 Stat. 395).)[8]

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[8] In addition to statutes of general applicability like the 1826 Act discussed in the text, enabling acts for the individual states ordinarily provided that when designated school sections had been "sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state * * * for the use of schools." 3 Stat. 430 (1818) (Illinois). See also, *e.g.*, 2 Stat. 175 (1802) (Ohio); 3 Stat. 290 (1816) (Indiana); 3 Stat. 491 (1819) (Alabama); 3 Stat. 547 (1820) (Missouri); 5 Stat. 58 (1836) (Arkansas); 5 Stat. 59 (1836) (Michigan); 5 Stat. 789 (1845) (Florida and Iowa); 9 Stat. 58 (1846) (Wisconsin). None of these provisions said anything about the way in which replacement tracts would be selected. An 1803 modification of the Ohio Enabling Act appears to be the only exception in the first half of the 19th century. The statute provided that "the sections of land heretofore promised for the use of

In 1859, still many years before Utah became a state, Congress appropriated additional public lands to replace school-grant sections on which settlements

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schools, in lieu of such of the sections, No. 16, as have been otherwise disposed of, shall be selected by the Secretary of the Treasury, out of the unappropriated reserved sections in the most contiguous townships." 2 Stat. 226.

What appear to be the earliest legislative provisions expressly granting a state or territory some measure of control over its indemnity selections were passed in 1853. In the Organic Act for Oregon, adopted in 1848 (see note 1, *supra*), the Territory of Oregon was promised Sections 16 and 36 in each township for the support of schools. Then in 1853, Congress authorized the Territory's legislature, acting through the county commissioners or any other officers that it chose, to select unoccupied in-lieu lands to replace any of the reserved sections that were "taken and occupied under the law making donations of land to actual settlers, or otherwise" (10 Stat. 150). Similarly, the 1853 act establishing a territorial government for Washington reserved Sections 16 and 36 in each township for school purposes and then addressed the situation "where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof" (10 Stat. 179). In that event, Congress said, "the County Commissioners of the counties in which said sections * * * are situated * * * are * * * authorized to locate other lands to an equal amount in sections, or fractional sections, * * * within their respective counties, in lieu of said sections so occupied" (*ibid.*). By thus authorizing the county commissioners to "select" or "locate" replacement lands in the Territories of Oregon and Washington, Congress apparently did not intend completely to surrender federal control over the selection process. Indeed, only six years later, Congress made clear that a federal officer was to have the final word on the selection of in-lieu lands in the states and the territories. See the discussion of the 1859 act in the text, *infra*. In practice, the county commissioners apparently recommended appropriate replacement tracts to the Department of the Interior, and the selections became effective if and when

with a view to preemption had been made before survey. The act sustained such settlers' claim to lands previously reserved for school use and made available to the states "other lands of like quantity * * * in lieu of such as may be patented by preemptors * * *." 11 Stat. 385. Recognizing that some states had already been granted two school sections in each township, Congress updated the 1826 statute to refer to Section 36 as well as Section 16. The new law provided for the situation in which all or part of either Section 16 or Section 36 was missing for geographical reasons. It stated: "[O]ther lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional, in quantity, or where one or both are wanting by reason of the township being fractional, or

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they were approved by the Secretary. See, *e.g.*, *Todd* v. *State of Washington*, 24 Pub. Lands Dec. 106 (1897).

A two-step referral system of this kind was explicitly described in the third 1853 statute that authorized local involvement in the indemnity selection process, the California land grant statute. (Unlike most states, California did not receive a grant of federal lands until three years after it entered the Union.) After granting the State Sections 16 and 36 in each township for the purposes of public schools, the 1853 law provided that "where any settlement * * * shall be made upon [these] sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the [1826] act * * * and * * * subject to approval by the Secretary of the Interior." 10 Stat. 247. Congress plainly viewed this recommendation and approval procedure as compatible with the 1826 act, which provided simply that the Secretary of the Treasury (and later, the Secretary of the Interior) should select the appropriate lands.

from any natural cause whatever" (*ibid.*). The 1859 statute further provided that all the appropriated lands were to be selected in the same maner as those appropriated under the 1826 law, namely, by the Secretary of the Interior.

The 1826 and 1859 statutes were revised and consolidated in Sections 2275 and 2276 of the Revised Statutes of 1874. Although there is no indication that any substantive change was intended (cf. *Chapman* v. *Houston Welfare Rights Organization*, No. 77-719 (May 14, 1979), slip op. 2-5 (Powell, J., concurring), and sources there cited), the revised sections contained no reference to the Secretary of the Interior or the Secretary of the Treasury or any other government official as the person authorized to select unappropriated public lands for grants in lieu of lost school lands. Indeed, the revised sections did not include any description of the manner in which the replacement tracts were to be selected.

The next general enactment on the subject came from Congress in 1891, five years before Utah achieved statehood. The amended version of Sections 2275 and 2276 appropriated public lands to replace school-grant lands that were lost to the states because of settlement with a view toward preemption or homestead, inclusion in an Indian, military, or other federal reservation, the fractional character of a township or granted section, the mineral character of a granted section,[9] or other disposition by the United

[9] The congressional decision to provide for the replacement of school-grant lands lost to the states because of their mineral character reflected a recognition that at least some school-grant acts did not grant mineral lands to the affected

States. The new statute (26 Stat. 796-797) provided that replacement tracts in lieu of lost school-grant lands "may be selected" by the states "from any unappropriated, surveyed public lands, not mineral in character, within the State * * * where such losses or deficiencies of school sections occur * * *." The prohibition against the selection of mineral lands, it should be noted, applied even if the lost school lands were mineral lands.

Now, for the first time in a statute of general application,[10] the States were expressly given a role

states, even if such lands were included within the numbered sections specifically reserved for school purposes. For example, in *Mining Co.* v. *Consolidated Mining Co.*, 102 U.S. 167 (1880), this Court held that the 1853 statute granting California Sections 16 and 36 in each township for school purposes did not cover mineral lands, even if those lands were found within the designated sections. Congress was familiar with the *Consolidated Mining* decision when it amended Section 2275 in 1891. See 22 Cong. Rec. 3465 (1891); S. Rep. No. 502, 51st Cong., 1st Sess. 1 (1890). The committee report made clear that Congress did not regard the *Consolidated Mining* decision as limited to the particular statute granting school lands to California. The report stated (*ibid.*):

> The United States Supreme Court has held * * * that the policy of Congress was not to grant mineral lands to the States, and that such mineral sections did not pass under the grant. But the United States in retaining ownership of these mineral sections, and disposing of the same under the mineral law, receives a revenue therefrom, and the school grant is *pro tanto* diminished. Recognition of the right to indemnity for mineral school sections does not, therefore, add an acre to such grant, as the United States retain the mineral sections and dispose of same under the mineral law.

[10] Using the same language employed again in the Utah Enabling Act a few years later, enabling acts for six states, adopted by Congress in 1889 and 1890, provided that, where

in the selection of indemnity lands, and indeed, the Secretary of the Interior was not mentioned. The question naturally arises whether this was a complete reversal of policy, consciously taken by the Congress. The indications are to the contrary.

First, the failure of the 1891 Act expressly to recognize the role of the Secretary was never understood to relieve him of all responsibility in the matter. Obviously, the Department in charge of administering the public domain must be the agency through which state selections would be processed, if nothing more. As this Court said in *Wyoming* v. *United States*, 255 U.S. 489, 494 (1921), "[o]ther laws of general application * * * required that the selections be made under the direction of the Secretary of the Interior." This is, moreover, confirmed by the contemporaneous Enabling Act provisions already noted (note 10, *supra*) and the Utah Enabling Act three years later (to be discussed in a moment), all of which required the affected state to obtain "the approval of the Secretary of the Interior" for its indemnity selections. It would be most strange if Congress were enacting

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school-grant sections had been "sold or otherwise disposed of" under the authority of a federal statute, equivalent indemnity lands were to be selected "in such manner as the [state] legislature may provide, with the approval of the Secretary of the Interior * * *." 25 Stat. 679 (1889) (North Dakota, South Dakota, Montana, Washington); 26 Stat. 215-216 (1890) (Idaho); 26 Stat. 222-223 (1890) (Wyoming). These provisions were the first since the California land grant statute of 1853 (see note 8, *supra*) to refer explicitly to the role of state authorities in the selection of indemnity lands.

a wholly different scheme in a general statute which, presumptively, applied to these very states.

Nothing in the legislative history of the 1891 Act suggests that the statute was intended to work a radical change in the Secretary's role. For example, the amendments' principal proponent in the House, Representative Payson of Illinois, explained the changes that the bill would make (22 Cong. Rec. 3464 (1891)):

> While somewhat voluminous in its details, there really is no change of existing law except in one particular, and that is that it gives to the school fund of the different States and Territories an increase in the land allotted for that purpose in case of reservations made by Congress for schools or colleges; that is, general grants of land for schools and colleges and other similar reservations. Then there is one other amendment in the bill which provides that the selections of land which may be lost to the school fund may be made in any portion of the State where agricultural land may be found, instead of in each land district as now. With these two exceptions there is no substantial change of existing law, except a modification of the administration of affairs in the General Land Office.

Similarly, the Senate report described the fundamental purpose of the 1891 law:

> In the administration of the law, it has been found by the Land Department that the statute does not meet a variety of conditions, whereby the States and Territories suffer loss of these sections without adequate provision for in-

> demnity selection in lieu thereof. Special laws have been enacted in a few instances to cover in part these defects with respect to particular States or Territories, but, as the school grant is intended to have equal operation and equal benefit in all the public land States and Territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded.

S. Rep. No. 502, 51st Cong., 1st Sess. 1 (1890).

Likewise, the report from the Department of the Interior's General Land Office, forwarded to Congress by the Secretary, stated that S. 1395, the bill that became the 1891 Act, "is substantially a re-enactment of Sections 2275 and 2276, Revised Statutes," with certain enumerated additions, none of which concerned the Secretary's authority to approve or disapprove indemnity selections (S. Rep. No. 502, *supra*, at 2). Indeed, the report specifically declared that "the only change in the method of making selections is that which authorized the selections to be made from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory, instead of confining them to the same land district in which the losses or deficiencies occur, as heretofore" (*ibid.*). Interior's General Land Office plainly contemplated a continuation of its role in approving or disapproving indemnity selections. That is the only explanation for the statement in its report praising the 1891 amendments for "mak[ing] clearer and more specific the limits of selection of indemnity for lands lost in place, thereby simplifying and facilitating the

examination and passing upon indemnity selections in this office" (*ibid.*).

To be sure, the new statute spoke in terms of selections made by the State instead of the Secretary. But that was presumably no more than a recognition of the prevailing practice, under which the State indicated the replacement tracts it wanted and asked the Secretary to approve. For obvious reasons, that had always been the procedure. To confirm it was no change. It would, however, have been a drastic alteration of previous arrangements if the Secretary retained no power to disapprove a State selection when, in his view, the public interest would be better served by reserving the lands selected for other uses. Until this Court spoke to the question in 1921 (see pages 28-30, *infra*), it was not understood that such a dramatic change had occurred.

B. The Utah Enabling Act

When Utah was admitted to the Union in 1896, it became the first state to receive four sections in each township for school purposes. In addition to Sections 16 and 36, Utah received Sections 2 and 32. Section 6 of the Utah Enabling Act of 1894, ch. 138, 28 Stat. 109, provided that:

> where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto * * * are hereby granted to said State * * *, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior * * *.

Section 13 of the Act, 28 Stat. 110, specified that "all land granted * * * as indemnity by this Act shall be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States" within the State of Utah.[11]

In 1902, Congress explicitly made Sections 2275 and 2276 applicable to Utah and stipulated that these general provisions should govern Utah's indemnity selections, notwithstanding anything to the contrary that may have been contained in the Utah Enabling Act. 32 Stat. 188-189 (now codified at 43 U.S.C. 853). There is no suggestion in the legislative history of the 1902 Act that its purpose was to eliminate the requirement in the Enabling Act that indemnity selec-

[11] The Enabling Act said nothing about mineral lands that happened to lie within the numbered sections granted to Utah for school purposes. In *United States* v. *Sweet*, 245 U.S. 563 (1918), this Court followed its decision in *Consolidated Mining* (see note 9, *supra*) and held that Congress did not intend to grant mineral lands to the State, even if they were within the specifically designated school-grant sections. Nine years later, Congress reversed the rulings in *Sweet* and *Consolidated Mining* and provided that "the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections." 44 Stat. 1026 (1927). At the same time, Congress carefully noted that the new provision "shall not apply to indemnity or lieu selections" (44 Stat. 1027). The states remained barred, as they had been at least since 1891, from selecting mineral lands in lieu of lost school-grant lands. This prohibition applied even where the lost lands were mineral in character.

tions take place under the direction of the Secretary of the Interior and with his approval. The statute was intended simply to make certain that Utah could select its indemnity lands on an equal footing with all the states governed by the amended version of Sections 2275 and 2276. See H.R. Rep. No. 1415, 57th Cong., 1st Sess. (1902); S. Rep. No. 1192, 57th Cong., 1st Sess. (1902). Representative Sutherland of Utah, in remarks made on the floor of the House moments before passage of the 1902 law, explained the bill's objectives (35 Cong. Rec. 4113 (1902)):

> [I]n the act of 1891 there is a provision for instance, that where these school sections are within an Indian reservation that the State need not wait until the reservation is opened, but may select school-indemnity lands in place of them. There is a provision in the act that where the sections are missing, either in whole or in part, that indemnity lands may be selected for them. These two provisions are not in the enabling act of Utah, but are in the general act of 1891, so that the result is that every other public-land State may select indemnity lands where the school lands are either within the limits of a reservation or found to be missing by reason of some natural condition, like the existence of a lake, except in the case of Utah; and this simply makes applicable to the State of Utah the provisions that prevail as to the other public land States.[12]

[12] The 1902 statute provided that Sections 2275 and 2276 should be understood to cover all four of the school sections granted to Utah in each township, even though the 1891 law expressly refers only to "sections sixteen and thirty-six."

The consequence is that, for purposes of the present case, it makes no difference whether Utah's claim to selections is founded on the general 1891 Act or the Enabling Act.

C. This Court's decisions in *Payne* v. *New Mexico* and *Wyoming* v. *United States*

Although it is not altogether clear whether the Department of the Interior followed any consistent practice with respect to state indemnity selections in the years following the 1891 Act, there is no doubt that the Secretary sometimes asserted a discretion to disallow such a selection, even when the tract in question met the statutory test of being "unappropriated" and nonmineral in character. See, *e.g.*, *Kinkade* v. *State of California*, 39 Pub. Lands Dec. 491 (1911); *State of Washington*, 36 Pub. Lands Dec. 371 (1908); *Swank* v. *State of California*, 27 Pub. Lands Dec. 411 (1898). See also 43 Pub. Lands Dec. 293 (1914). Somewhat indirectly, but effectively, this claim of power was brought to an end by two decisions of this Court in 1921.

The first of the cases was *Payne* v. *New Mexico*, 255 U.S. 367 (1921). At issue was the validity of the Department's "cancellation" of state selections that had been made in lieu of school grants in place, the original grants having been "waived," as the relevant statute permitted, when the sections were included in a National Forest. The basis of the cancellation was that, before the selections had been "approved" by the Secretary, the tracts in place had been restored to the public domain, thus defeating the premise for any lieu selection. This Court held that the validity

of the selections must be judged as of the date when the state completed their filing, not the time (more than a year later) when the Secretary considered them. The relevance of the decision here, however, is in its rejection of the government's argument that the Secretary's "approval" of the selection—which was required by the applicable statute—was a matter of discretion, and not a ministerial or "judicial" function. 255 U.S. at 371.

The same point was made, even more forcefully, in *Wyoming* v. *United States*, 255 U.S. 489 (1921). The factual setting in the latter case was the same, except that the refusal to approve the lieu selection was based on a Pickett Act withdrawal of the selected acreage (see page 31, *infra*) that occurred after the selection was filed but before the Secretary considered it. The Court held that the withdrawal came too late to be effective. But, in reaching that conclusion, the Court expressly rejected the suggestion that "the selection was merely a proposal by the State which the land officers could accept or reject." 255 U.S. at 496. Again, it was said that the action of the Department in "approving" such a lieu selection "was to be judicial in its nature." *Id.* at 497.

We may question whether these decisions, assimilating state indemnity selections to private entries and lieu selections, accurately translate the intent of the Congresses that wrote the selection statutes. It seems unnecessary to debate that matter now, however, because, in our view, the passage of the Taylor Grazing Act in 1934 and its amendments two years later, together with the issuance of Executive Order

No. 6910, effectively overturned *Payne* and *Wyoming* by restoring to the Secretary his traditional discretion to control the selection process in the public interest. After *Payne* and *Wyoming*, the critical question was whether a state indemnity selection sought land that was "unappropriated" and therefore available for selection under Section 2276 of the Revised Statutes, or whether the selection sought "appropriated" land, land that had already been withdrawn through settlement, reservation, or other disposition by the United States and that was therefore unavailable unless and until the withdrawal was lifted. After 1934, all public lands in Utah and several other states were withdrawn and could become available for indemnity selection or other entry only if the Secretary classified them as proper for that purpose, in his discretionary authority under Section 7 of the Grazing Act as amended in 1936.

D. Presidential Withdrawals of Public Lands from the Set of "Unappropriated Lands" Available for In-Lieu Selections

The President has long exercised the authority to effect temporary withdrawals of public lands from settlement, selection, or other disposition. This Court has sustained the President's power to make such withdrawals even without specific statutory authorization. *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 467 (1915) (sustaining a 1909 Presidential Proclamation that withdrew certain petroleum lands in California and Wyoming from "all forms of location, settlement, selection, filing, entry, or disposal under

the mineral or nonmineral public-land laws").[12a] See also 54 Pub. Lands Dec. 353 (1934). Any doubts concerning the propriety of such Presidential action were removed by the passage of the Pickett Act in 1910 (43 U.S.C. (1970 ed.) 141). The Act provided:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Although the statutory language refers only to withdrawals from "settlement, location, sale, or entry," it is clear that a valid Pickett Act withdrawal "appropriates" the affected land and renders it unavailable for state indemnity selection. See *Wyoming* v. *United States*, *supra*, 255 U.S. at 489, 508-509.[13] Indeed, this Court has held that a Pickett Act withdrawal will defeat even an original school grant, if the with-

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[12a] In Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, Congress prospectively repealed the "implied authority of the President to make withdrawals and reservations resulting from the acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) * * *."

[13] The State prevailed in *Wyoming* not because a Pickett Act withdrawal is ineffective in making public land unavailable for indemnity selection, but only because the withdrawal in that case occurred after the State had already filed its selection and was thus too late to "appropriate" the affected land, in the Court's view.

drawal is announced before survey of the designated section. *United States* v. *Wyoming*, 331 U.S. 440 (1947) (1915 withdrawal held to reserve title in the United States, because survey of Section 36 in affected township not made until 1916).

Two Executive Orders, issued under the authority of the Pickett Act, have some bearing on this case.[14] The first is Executive Order No. 5327, issued by President Hoover on April 15, 1930. The Order withdrew all lands containing deposits of oil-shale from "lease or other disposal" and reserved such lands "for the purposes of investigation, examination, and classification." Of course, when it was issued, Executive Order No. 5327 did not affect the state indemnity selection process, because Section 2276 of the Revised Statutes, as amended in 1891, precluded the states from selecting any mineral lands in lieu of lost school grants (see page 21, *supra*). Later, however, when Congress decided to permit the selection of mineral lands in certain circumstances (see note 25, *infra*), it had to reckon with the 1930 Order, an order that remains in effect even today.

The second Executive Order relevant to the present controversy is No. 6910, issued by President Roosevelt on November 26, 1934. The significance of this Order cannot be appreciated without an awareness

[14] Although the Pickett Act was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, the latter statute expressly provides that previous Pickett Act withdrawals shall remain in "full force and effect until modified." Section 701(c), 90 Stat. 2786.

of the basic provisions of the Taylor Grazing Act, enacted five months earlier. We therefore defer consideration of Executive Order No. 6910 until we have reviewed the relevant portions of the Taylor Act as Congress originally passed it in June 1934.

E. The Taylor Grazing Act and Its Aftermath

1. *Relevant Features of the Act as Originally Passed: Section 1*

The stated purpose of the Taylor Grazing is "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration" and "to provide for the orderly use, improvement, and development of the public range * * *." H.R. Rep. No. 903, 73d Cong., 2d Sess. 1, 2 (1934); S. Rep. No. 1182, 73d Cong., 2d Sess. 1, 2 (1934). To this end, the Act authorizes the Secretary of the Interior "in his discretion, * * * to establish grazing districts * * * of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States * * *, which are not in national forests, national parks and monuments, [or] Indian reservations * * *, and which in his opinion are chiefly valuable for grazing and raising forage crops * * *." 48 Stat. 1269 (now codified at 43 U.S.C. 315).[15] The Act requires the

[15] Although the opening portion of Section 1 refers only to grazing districts created from "unappropriated and unreserved" public land, the Section's first proviso permits public lands already withdrawn or reserved for other purposes to be included in a grazing district, with the "approval of the head of the department having jurisdiction thereof." One practical consequence of this provision in 1934 was that oil shale lands withdrawn four years earlier by Executive Order No. 5327 could be included in grazing districts at the discretion

Secretary to publish notice of his intention to create a grazing district in a particular area and provides further that "publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of [*sic*; presumably should be "or"] settlement." 48 Stat. 1270.

This language in Section 1 of the Act is critical to the present case. It establishes that inclusion of public land in a grazing district "appropriates" that land and makes it unavailable for "all forms of entry or settlement." The Secretary's discretionary decision to include certain public lands in a grazing district thus operates similarly to a Pickett Act withdrawal. In particular, by withdrawing grazing district lands from "all forms of entry or settlement," the Secretary's decision to create such a district renders the affected lands unavailable for state indemnity selection. This result is consistent with the established effect of a Pickett Act withdrawal. Indeed, although the latter statute speaks only of withdrawals from "settlement, location, sale, or entry," after *Wyoming* v. *United States*, *supra*, and *United States* v. *Wyoming*, *supra*, there can be no doubt that a timely withdrawal under the Act also precludes indemnity selections in lieu of lost school lands. By the same token, although the Taylor Grazing Act refers only to withdrawal from "all forms of entry or settlement," the latter phrase is properly construed to comprehend school-grant indemnity selections.

of the Secretary of the Interior, who, of course, is the "head of the department having jurisdiction" over public mineral lands. See *Hickel* v. *Oil Shale Corp.*, 400 U.S. 48, 54 n.7 (1970).

One additional provision in Section 1 of the Taylor Grazing Act merits explanation. It states that the Secretary's establishment of grazing districts shall not

> affect any land heretofore or hereafter surveyed which, except for the provisions of this Act would be a part of any grant to any State * * *.

This provision was not contained in H.R. 2835, the first version of the Act introduced in the 73d Congress. 77 Cong. Rec. 172 (1933). Nor was it included in the nearly identical H.R. 6462, introduced 10 months later. 78 Cong. Rec. 167-168 (1934). The language reproduced above was added to H.R. 6462 by the House Committee on Public Lands and was included in the bill as it was reported in March 1934. 78 Cong. Rec. 4224 (1934). See *To provide for the orderly use, improvement, and development of the public range: Hearings on H.R. 2835 and H.R. 6462 Before the House Comm. on Public Lands*, 73d Cong., 1st and 2d Sess. 195 (1934).[16]

[16] As reported by the House Committee, the full sentence containing the phrase under consideration read as follows:

> Such orders [*i.e.*, the Secretary's orders creating grazing districts] shall be so worded as to safeguard valid claims existing on the date thereof and shall not affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State.

At the subsequent Senate hearings on H.R. 6462, Senator Ashurst of Arizona expressed concern that the House's draft might not adequately protect existing water rights in the

The Committee did not discuss the reasons for this addition to Section 1, and the amendment was accepted on the House floor without debate. 78 Cong. Rec. 6365 (1934). Nor have we been able to find any testimony during the House hearings concerning the potential relationship between the proposed grazing districts and the school sections granted to the states years earlier. It is fairly certain, however, from later remarks in hearings before the Senate Committee on Public Lands and Surveys that the House Committee added the amendment to Section 1 because

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western states (*To provide for the orderly use, improvement, and development of the public range: Hearings on H.R. 6462 Before the Senate Comm. on Public Lands and Surveys*, 73d Cong., 2d Sess. 64 (1934)). Apparently in response to this concern, the Senate Committee amended the House's sentence to read as follows (78 Cong. Rec. 11147 (1934)):

> Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provision of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction.

The amendment was accepted by the Senate without debate. At conference, the House agreed to the Senate amendment, but added the phrase "validly affecting the public lands" after the words "existing law." H.R. Conf. Rep. No. 2050, 73d Cong., 2d Sess. 1, 4 (1934); 78 Cong. Rec. 12167, 12168 (1934). The Senate accepted this further amendment, and the version of the sentence reported by the Conference Committee is the one now found in Section 1 of the Taylor Grazing Act, 43 U.S.C. 315. There is no evidence that any of the changes made by the Senate Committee were intended to affect state indemnity selection rights.

it wished to protect the states' right to the enumerated school sections granted at or around the time each state joined the Union. See *To provide for the orderly use, improvement, and development of the public range: Hearings on H.R. 6462 Before the Senate Comm. on Public Lands and Surveys*, 73d Cong., 2d Sess. 63-64, 164 (1934). See also Circular No. 1346, issued by the Department of the Interior's General Land Office, 55 Interior Dec. 192, 204-205 (1935).

It was understood in 1934, as this Court held 13 years later (see *United States* v. *Wyoming*, *supra*), that a federal withdrawal of public lands before survey would defeat a preexisting school grant. When the Taylor Grazing Act was passed, a substantial number of sections among those specifically granted to the states in state enabling acts had not yet been surveyed. The western states, in which most of this unsurveyed land was located, were apparently concerned that creation of grazing districts encompassing unsurveyed sections would constitute a federal withdrawal and would thus deprive the states of original school-grant sections. The House Committee amendment to Section 1 of the Act was added to avoid this problem and to ensure that states would not lose enumerated school sections through placement in a grazing district before survey.

Testimony from western state witnesses at the Senate Committee hearings demonstrates that, even after the House Committee amendment, all participants in the legislative process assumed that public lands placed in grazing districts would be unavailable for indemnity selection. Indeed, one witness sug-

gested that the Act be further amended to empower the states to select land withdrawn for grazing district purposes (Senate Hearings, *supra*, at 162-165),[17] and other witnesses, including the Governor of Wyoming, contended that an amendment should be added to give the states an absolute right to exchange school sections already held by the states for previously unappropriated public lands placed in grazing districts (*id.* at 198-200, 211-215, 217). No such amendments were adopted, and the plain implication of the testimony at the Senate hearings is that the House amendment alone was insufficient to preserve the availability of grazing district land for indemnity selection.

2. *Executive Order No. 6910*

Five months after the Taylor Grazing Act became law, President Roosevelt issued Executive Order No. 6910. The Order explicitly acknowledged the passage and purposes of the Act and declared that the President found it "necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act." Accordingly, the Order withdrew all unreserved and

[17] See also the comment of General Land Office Commissioner Johnson, reporting to Secretary Ickes on state reaction to H.R. 2385, the predecessor of the bill that became the Taylor Grazing Act:

> A number of the States have objected upon the theory that the establishment of a grazing district would restrict the State in its indemnity selections.

Reproduced in H.R. Rep. No. 903, *supra*, at 9; S. Rep. No. 1182, *supra*, at 7.

unappropriated public land in 12 western states, including Utah, from "settlement, location, sale, or entry," and reserved such land for classification, "pending determination of the most useful purpose" to which such land might be put under the Act, and "for conservation and development of natural resources." The Order stated that the withdrawal it effected was "subject to existing valid rights."

In February 1935, the Solicitor of the Department of the Interior rendered an opinion stating that "all prior applications for entry, selection, or location, which were substantially complete at the date of the withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order." 55 Interior Dec. 205, 210 (1935).[18] The unmistakable implication of

[18] The Solicitor's opinion also took the position that Executive Order No. 6910

> applies to lands which, at the date of its issuance, were covered by outstanding entries or other appropriations under the public-land laws or by withdrawals or reservations, and takes effect as to such lands whenever they become a part of the public lands of the United States by reason of the termination of the outstanding appropriation, withdrawal, or reservation.

55 Interior Dec. at 207-208. This view was confirmed by Executive Order No. 7048, issued by President Roosevelt in May 1935. Thus, for example, oil shale lands previously withdrawn by Executive Order No. 5327, would automatically remain withdrawn under Order No. 6910, if, at some later date, the withdrawal effected by President Hoover's Order were revoked or terminated.

The Solicitor further stated in February 1935 that, in his view, Executive Order No. 6910 was not intended to forbid the inclusion in grazing districts of public lands with-

the Solicitor's words was that selections not yet filed at the time of the Executive Order could not be perfected because of the withdrawal of all unappropriated land in the affected states. This interpretation was confirmed two months later in an opinion of the First Assistant Secretary regarding a school indemnity selection list filed by the State of Arizona.[19] Because the list was filed in December 1932, long before Executive Order No. 6910, the Secretary ruled that it was an "existing valid entry" and therefore protected from the effect of the later withdrawal. *State of Arizona*, 55 Interior Dec. 249, 253-254 (1935). But the opinion left no doubt that further indemnity selections, filed after the Executive Order, could not be approved. In the Secretary's words, "The law provides that indemnity lands may be taken for the school sections lost, but through the withdrawal of all public lands, there is no indemnity land to be obtained." *Id.* at 253.[20]

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drawn from "settlement, location, sale, or entry" by the Order. Any doubt about the correctness of this aspect of the Solicitor's opinion was removed in January 1936, when President Roosevelt issued Executive Order No. 7274. That Order "exclud[ed] from the operation" of Order No. 6910 "all lands which are now, or may hereafter be, included within grazing districts * * *, so long as such lands remain a part of any such grazing district."

[19] Arizona was one of the 12 western states named in Executive Order No. 6910.

[20] Because, as we observed earlier (see page 31, *supra*), a Pickett Act withdrawal announced before survey would defeat even a preexisting grant of specifically designated school sections, the states affected by Executive Order No. 6910 apparently feared that the Order deprived them, at least temporarily, of all original school-grant sections that had not

At the time of the *Arizona* decision in April 1935, then, it was well understood that Executive Order No. 6910 withdrew all unappropriated public lands in Utah and in the other 11 states named and left no such lands available for indemnity selections. Subsequently, in June and July 1935, the Secretary of the Interior issued orders creating and then expanding Grazing District No. 8 in northeastern Utah. Among the public lands included in that district were the lands that are now the subject of this lawsuit, *i.e.*, the 157,000 acres for which Utah filed indemnity selections between September 1965 and November 1971. The parties and the courts below agree that all the lands so selected are now located in a grazing district and were located in such a district at the time Utah filed its selections (Pet. App. 27a, 68a).[21]

But this did not release these tracts for selection. In light of the purposes of the Taylor Grazing Act and Executive Order No. 6910, it is hardly conceivable that the placement of these public lands in a grazing district in the summer of 1935 made them

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been surveyed by November 28, 1934, the date of the Order's issuance. To allay this concern, President Roosevelt, in April 1937, issued Executive Order No. 7599, which "exclud[ed] from [the] operation" of Order No. 6910 all lands, identified by survey after November 1934, which "would otherwise become a part of the school-land grant of designated sections to any of the States mentioned in the said order[]." 43 C.F.R. 297.18 (1938); 2 Fed. Reg. 633 (1937).

[21] In July 1975, the Department of the Interior's Bureau of Land Management modified the boundaries of Grazing District No. 8 so that the district now includes, *inter alia*, all of Uintah County. At the same time, the district was redesignated as the Vernal Grazing District. 40 Fed. Reg. 32147 (1975).

immediately available for indemnity selection, notwithstanding the broad withdrawal ordered by the President only a few months before. Moreover, such a consequence with respect to lands previously withdrawn by Order No. 6910, would render wholly superfluous Executive Order No. 7274, issued by President Roosevelt on January 14, 1936 (see note 18, *supra*).

That Order "exclud[ed] from the operation" of Order No. 6910 all public lands placed in grazing districts, for as long as the lands remained in any such district. The President would never have taken such a step unless he believed that placement of public lands in a grazing district itself served to "appropriate" such lands and withdraw them from "all forms of entry or settlement." And, of course, there was good reason for that belief: Section 1 of the Taylor Grazing Act explicitly provided that such a withdrawal would result from the Secretary's inclusion of public lands within a grazing district.

3. *The 1936 Amendment to Section 7 of the Taylor Grazing Act*

Congress soon realized that the situation created by Executive Order No. 6910 was too inflexible. All the unappropriated public lands in 12 western states had been withdrawn from settlement or entry, and the Taylor Grazing Act did not generally authorize the Secretary of the Interior to decide that land originally placed in grazing districts could better be used for some other purpose. There was one limited exception in the Act as originally passed. Section 7 empowered the Secretary "to examine and classify"

grazing district lands "which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants" (48 Stat. 1272). In that case, the Secretary was further authorized "to open such lands to homestead entry * * *."[22] This was, however, a restricted authority and, in the spring of 1935, Senators Ashurst and Hayden, both of Arizona, embarked on a plan to expand Section 7 and grant the Secretary discretion to permit a wide variety of entries on grazing district land, including entries through school indemnity selection.

Shortly after the 74th Congress convened, a bill was introduced in the House of Representatives to amend the Taylor Grazing Act in several ways not pertinent to this case. H.R. 3019, 74th Cong., 1st Sess. (1935); 79 Cong. Rec. 178 (1935). The House Committee on Public Lands conducted hearings on the bill and reported it favorably, with certain changes not relevant here. H.R. Rep. No. 479, 74th Cong., 1st Sess. (1935). The revised House Bill was then introduced in the Senate (S. 2539; 79 Cong. Rec. 5286 (1935)) and referred to the Committee on Public Lands and Surveys. Hearings were held in May and June 1935. On the first day of hearings, Senators Ashurst and Hayden offered an amendment to the bill. The proposed amendment added a new section designed to increase substantially the scope of the Secretary's discretionary authority under Section 7 of the Act. It provided:

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[22] Section 7 stated: "Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry * * * by the Secretary" (48 Stat. 1272).

> [T]he Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive Order [No. 6910] * * * or within a grazing district, which are more valuable or suitable for * * * any other use than for the use provided for under this Act, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws * * *. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry.

To amend the Taylor Grazing Act: Hearings on S. 2539 Before the Senate Comm. on Public Lands and Surveys, 74th Cong., 1st Sess., pt. 1, 1-2 (1935).[23]

Virtually the entire first day of hearings was occupied by the testimony of one witness, Richard Page, an attorney from Arizona who had been invited by Senators Ashurst and Hayden to explain

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[23] The proposed Ashurst-Hayden amendment also adjusted the language of the proviso to the original Section 7 in order to require the Secretary to act on applications for classification of withdrawn land as more suitable for some purpose other than grazing (not necessarily homesteading). The new proviso read as follows (*Hearings on S. 2539, supra*, at 2):

> [U]pon the application of any person qualified to make entry, selection, or location, under the public-land laws, * * * the Secretary of the Interior shall cause any tract to be classified, and such application shall entitle the applicant to a preference right to enter, select, or locate such lands when opened to entry as herein provided.

(The word "person" in the first line of the proviso was changed to "applicant" by the Conference Committee. H.R. Conf. Rep. No. 1847, 74th Cong., 1st Sess. 6 (1935), reprinted at 79 Cong. Rec. 14011 (1935).)

the need for a revised Section 7. Page began by informing the Committee of the situation created by the Taylor Grazing Act and Executive Order No. 6910. He said (*Hearings on S. 2539, supra*, at 3): "[W]e are now tied up in just one general withdrawal of all public lands, and everything else in the public-land structure and in all of the public-land laws and the contractual relations between the Government—and I refer to existing exchange acts and everything—they have all ceased to function." Further testimony by Page and a responsive remark by Senator Hayden show that both men shared the view presented here: first, that indemnity school selections were barred by Executive Order No. 6910 and by the placement of public lands in grazing districts under the Taylor Grazing Act; and second, that the proposed revision of Section 7 would authorize the Secretary to permit state indemnity selections by classifying withdrawn land (including land in grazing districts) as available for that purpose. Page testified (*Hearings on S. 2539, supra*, at 13):

> [T]his general withdrawal, to be followed by a tremendous amount of grazing districts, if there cannot be this provision for proper disposal for higher use and also having lands that can be applied for under the outstanding exchange laws, scrip laws, indemnity grants, and all those other existing contracts of the Government through prior legislation, if there is no land left where those rights can be exhausted, then there is going to be such an accumulating opposition to this whole Taylor Act, if development is

> stopped on the one side, because you cannot have the land that you need for a higher use than grazing, and on the other hand if there is no land upon which all of these outstanding rights of selection or location can be used, [the] grazing administration will be just swamped with so much trouble that they won't have any time or opportunity to properly administer grazing * * *.

Page then described a situation in which the government had granted private landowners in-lieu rights to select public lands in exchange for the property they then held, property that the government wanted to use for expansion of the Navajo Indian Reservation. He stated (*Hearings on S. 2539, supra,* at 15):

> The remaining 15,000 acres desired for the extension of the Navajo Reservation, as to which the rights of selection have not been exercised, are still privately owned and will be until the right is exhausted by the patenting of lieu selections. If there is no land in Arizona which is open to entry, and there is none now, that exchange right cannot be used. Therefore the Indian Office will find one of these days that they have not got title back to their lands, and they have got privately owned lands in their reservations, and there is going to be quite a little antagonism to the grazing law by reason of the fact that they have not got their situation cleared.

And Senator Hayden responded (*ibid.*): "The same thing would be true of a grant made to a State for university purposes or an indemnity selection."

The Senate Committee adopted the Ashurst-Hayden amendment nearly verbatim [23a] and reported the bill, with this and other major amendments, to the full Senate. S. Rep. No. 1005, 74th Cong., 1st Sess. (1935). The Senate accepted the new version of Section 7, with the addition of a proviso, stating that mining entries under the Mineral Lands Leasing Act of 1920 ~~may~~ be made on withdrawn lands, without awaiting classification and open by the Secretary. 79 Cong. Rec. 12176-12177 (1935). (The proviso's clear implication was that all other forms of entry did require such classification and opening.) The Senate

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[23a] It appears that the Senate Committee slightly revised the proviso in the Ashurst-Hayden amendment (see note 23, *supra*) to make clear that the Secretary would be under no obligation to approve applications for "entry, selection, or location." The Committee simply added the phrase "if allowed by the Secretary" to the version of the proviso initially suggested by the Senators from Arizona. As reported, the proviso read as follows (emphasis added):

> [U]pon the application of any person qualified to make entry, selection, or location, under the public-land laws, * * * the Secretary of the Interior shall cause any tract to be classified, and such application, *if allowed by the Secretary of the Interior,* shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

The Senate Committee report (S. Rep. No. 1005, 74th Cong., 1st Sess. (1935)) did not note the addition to the language originally proposed at the Committee hearings, but other evidence indicate that the change was made at the committee level. No amendment to the proviso was introduced or discussed on the Senate floor (see 79 Cong. Rec. 12173-12181 (1935)), and the Conference Committee report reveals that the only change made at that stage was the substitution of the word "applicant" for the word "person" in the first line of the proviso (see note 23, *supra*).

then passed the amended bill (*id.* at 12181) and forwarded it to the House, which earlier had passed the version of the bill reported by the House Committee (*id.* at 8109). The Senate prevailed at conference (see H.R. Conf. Rep. No. 1847, 74th Cong., 1st Sess. (1935)), and the bill was forwarded to the President for his signature (79 Cong. Rec. 14392 (1935)). The President exercised a pocket veto and thus deferred amendment of Section 7 until 1936.

When the new session of the 74th Congress opened, a bill was immediately introduced in the House of Representatives that would have accomplished one of the goals of the legislation considered the previous year. As initially introduced, H.R. 10094 would have changed existing law in only one way: it would have raised the acreage limitation in Section 1 of the Grazing Act to permit 143 million acres of public land, rather than 80 million acres, to be placed in grazing districts. The House Committee on Public Lands quickly reported the bill (H.R. Rep. No. 2125, 74th Cong., 2d Sess. (1936)), and it passed the House after a perfunctory floor discussion. 80 Cong. Rec. 3815-3816 (1936).

When the bill reached the Senate, however, the Senate Committee on Public Lands and Surveys transformed it into a measure similar to the proposed statute vetoed by the President the previous year. Compare the texts at 79 Cong. Rec. 14011-14012 (1935) and 80 Cong. Rec. 10479-10480 (1936). As reported by the Senate Committee (S. Rep. No. 2371, 74th Cong., 2d Sess. (1936)), the proposed revision of Section 7 of the Act was identical to the 1935 version, except for the addition of one noteworthy phrase. The amended H.R. 10094 explicitly authorized the Secretary to "examine and classify" not only withdrawn lands (including grazing district lands) that are more valuable or suitable for a use other than grazing but also such lands that are "proper for acquisition in satisfaction of any outstanding lieu, exchange or script [*sic*; should be "scrip"] rights or land grant * * *." With the addition of this phrase, there could no longer be any doubt that the revised Section 7 was intended to permit the Secretary to "unlock" withdrawn lands in order to make them available for school indemnity selection. Although, in view of the testimony at the 1935 Senate hearings recounted above, it seems clear that the original Ashurst-Hayden amendment was designed, *inter alia*, to restore the possibility of exercising in-lieu rights in states affected by Executive Order No. 6910, the embellished 1936 version accomplishes that end more straightforwardly.[24]

In the amended form reported by the Senate Committee, H.R. 10094 passed both the Senate and the

[24] Unfortunately, the Senate report on the amended H.R. 10094 was exceedingly terse. With respect to Section 7, it stated only that the revision was intended "to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing." S. Rep. No. 2371, *supra*, at 2. This was precisely the same language that the Committee had used a year earlier to describe the Ashurst-Hayden amendment, the revised version of Section 7 that was contained in the bill vetoed by the President and that, of course, did not include the new phrase added in 1936. See S. Rep. No. 1005, *supra*, at 2.

House in short order. 80 Cong. Rec. 10479-10480, 10624-10626 (1936). This time, the President signed the bill, and the current version of Section 7 became law. 49 Stat. 1976 (now codified at 43 U.S.C. 315f).

We have recited this detailed history in order to demonstrate that, notwithstanding the contrary views of respondent and the courts below, the matter of in-lieu selections generally and, in particular, school indemnity selections was very much within Congress' contemplation when it amended Section 7 in 1936. As early as the spring of 1935, Congress, the Department of the Interior, and knowledgeable persons in the western states recognized the drastic effect that Executive Order No. 6910 had had on the exercise of outstanding indemnity rights. No land was available for such selections because it had all been withdrawn by the Executive Order or reserved in grazing districts under the Act. The Ashurst-Hayden amendment was Congress' method of dealing with the problem. It authorized the Secretary to classify withdrawn land as appropriate for acquisition in satisfaction of outstanding lieu rights or, indeed, for any use other than grazing. But, at the same time, the revised version of Section 7 retained the original sentence providing that withdrawn lands (including grazing district lands) "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." See note 22 and accompanying text, *supra*. Thus, while the Secretary may now classify withdrawn and grazing district lands as available for any use for which they are suited, such classification is a prerequisite

under Section 7 for any entry for a purpose other than grazing. And acquisition by a state in lieu of lost school lands is such an entry, as *Wyoming* v. *United States, supra,* shows.

Ever since his decision in *State of Arizona, supra,* in 1935, the Secretary has consistently adhered to the position stated above. Formal regulations embodying this interpretation of the governing statute were first issued in 1943, 8 Fed. Reg. 7284-7285 (1943), and, with further elaboration, remain in effect to this day. 43 C.F.R. 2400.0-3, 2450.1-2450.8, 2621.2. Administrative decisions also have regularly proceeded on the premise that classification under Section 7 is a prerequisite for state acquisition of public lands through indemnity selections. See, *e.g., State of Arizona,* 59 Interior Dec. 317 (1946); *State of California,* 59 Interior Dec. 451 (1947); *State of California,* 67 Interior Dec. 85 (1960); *State of Utah,* 71 Interior Dec. 392 (1964). See also 42 Op. Att'y Gen. 173, 180-181 (1963) ("under Section 7 of the Taylor Grazing Act (43 U.S.C. 315f), [the Secretary has] discretion to determine whether particular lands should be made available for selection under section 2275 of the Revised Statutes"). In sum, the Secretary's views concerning the effect of Section 7 on the state indemnity selection process find ample support in the historical background of the Act and its 1936 amendments and in the available contemporary legislative materials. They derive further legitimacy from 40 years of uninterrupted practical application by the agency charged with the responsibility for administering the public land laws.

Moreover, the Secretary's approach makes eminently good sense from a policy standpoint. That is why Congress, as long ago as 1826 and 1859, when it first provided for state indemnity selections in lieu of lost school lands, chose to vest complete authority over such selections in the Secretary of the Treasury and his successor, the Secretary of the Interior. Indeed, as we have shown (see pages 20-25, *supra*), Congress never formally rescinded the Secretary's discretionary control over in-lieu selections, but that authority was eroded to a mere ministerial function by this Court's rulings in *Wyoming* v. *United States*, *supra*, and *Payne* v. *New Mexico*, *supra*. Through Executive Order No. 6910 and the Taylor Grazing Act, as amended, Congress and the President restored the Secretary's discretionary authority over indemnity selections to something approximating what it was when such selections were first permitted.

The major salutary consequence of this development was that it enabled the Secretary more effectively to exercise his responsibility for managing the public domain in a consistent and rational way designed to accommodate the many aspects of the public interest involved. The development of new energy sources, for example, must be encouraged without ignoring conservation needs or overriding recreational, scenic, and other environmental values. The careful weighing of competing considerations required by the Secretary's complex task cannot be performed successfully without a substantial degree of control over alienations from the public domain. Executive Order No. 6910 and Section 7 of the Act, as

amended, assure the Secretary the necessary authority to accomplish the varied objectives of the public lands program.

F. The 1958 Amendments to Sections 2275 and 2276 of the Revised Statutes

In 1958 Congress for the first time chose to allow states, under certain circumstances, to select mineral lands in lieu of lost school lands. When Utah joined the Union in 1896, and for more than 60 years thereafter, Section 2276 of the Revised Statutes flatly prohibited indemnity selections of mineral land (see page 21, *supra*). Now, under the 1958 amendments to Section 2275 and 2276, states may select mineral land to replace original school lands that were lost through appropriation before survey and that were mineral in character. Pub. L. No. 85-771, 72 Stat. 928 (codified at 43 U.S.C. 852(a)(1)).[25] The ~~155,700~~ 51,000 acres

[25] In permitting the selection of mineral lands, Congress had to make special provision for the oil shale lands withdrawn in 1930 by Executive Order No. 5327. At the suggestion of the Department of the Interior (see S. Rep. No. 1735, 85th Cong., 2d Sess. 9 (1958); H.R. Rep. No. 2347, 85th Cong., 2d Sess. 5 (1958)), Congress included in the 1958 amendments a statement that "[t]he term 'unappropriated public lands' as used in this section shall include * * * lands withdrawn by Executive Order Numbered 5327 * * *, if otherwise available for selection." 72 Stat. 929 (codified at 43 U.S.C. 852(d)(1)). But because of Executive Order No. 6910 (expressly made applicable to already withdrawn lands if and when such earlier withdrawal is terminated (see note 18, *supra*)), and because of the withdrawal of oil shale lands placed in grazing districts with the approval of the Secretary under the first proviso in Section 1 of the Grazing Act (see note 15, *supra*), oil shale lands in Utah are not "otherwise available for selection," unless they are first classified as such by the Secretary in accordance with Section 7.

selected by Utah between 1965 and 1971 are all said to be mineral in character and, correspondingly, Utah asserts that the lost school lands to be replaced were mineral in character (Pet. App. 21a). The accuracy of these representations is still to be determined but may be assumed for present purposes.

The court of appeals has suggested (Pet. App. 16a-17a) that, in view of the 1958 amendments to the state indemnity selection statute, the Secretary is obligated to approve Utah's in-lieu selections if he determines that the base lands lost by the State were mineral in character. But the court's opinion underestimates the significance of the Secretary's discretionary authority under Section 7 of the Taylor Grazing Act. To be sure, Utah is authorized under Sections 2275 and 2276 to select mineral lands to replace lost school lands that happened to be mineral. But that does not mean that the Secretary is required to approve every selection that meets the statutory criteria established in 1958. The 1958 amendments were intended only to make the selection of mineral lands possible, where it had previously been prohibited; they did not purport to restrict the Secretary's exercise of discretion under Section 7 of the Grazing Act. Where lost school lands were mineral, the 1958 amendments simply placed indemnity selections of mineral lands on an equal footing with other possible indemnity selections available to the states. With respect to all such selections of withdrawn or grazing district land, however, the Secretary retains the discretionary classification authority conferred on him by the revision of Section 7 in 1936.

The limited legislative history of the 1958 amendments supports this position. Assistant Secretary of the Interior Ernst, in submitting the Department's views on the proposed legislation to the House and Senate Committees on Interior and Insular Affairs, wrote:

> We assume that nothing in this bill is intended to affect the rights or duties of States under other laws. In particular, we assume that no change is intended to be made in section 7 of the Taylor Grazing Act, as amended (43 U.S.C., sec. 315f).

S. Rep. No. 1735, 85th Cong., 2d Sess. 4, 11 (1958); H.R. Rep. No. 2347, 85th Cong., 2d Sess. 6 (1958). The Senate Committee "incorporated" the reports from Interior as a part of its own report (S. Rep. No. 1735, *supra*, at 2), and the House Committee explicitly stated that it concurred in the Department's comments concerning Section 7 (H.R. Rep. No. 2347, *supra*, at 2).

If any further confirmation were needed for the continuing applicability of the Secretary's Section 7 discretion to all indemnity selections, including selections of mineral lands, it was provided two years later, when Congress enacted additional amendments to Sections 2275 and 2276. Pub. L. No. 86-786, 74 Stat. 1024. The substance of the 1960 amendments is not pertinent to the present dispute, but the report of the House Committee on Interior and Insular Affairs leaves no doubt that the legislators primarily responsible for supervision of the public lands program recognized the Secretary's authority over indemnity selections of mineral lands, as well as other indemnity selections. The report stated:

> A selection by a State can be consummated only if the land selected is classified by the Secretary of the Interior as proper for acquisition in satisfaction of an outstanding lieu right, as provided in section 7 of the Taylor Grazing Act (43 U.S.C., sec. 315f).
>
> * * * The prohibition against the selection of [mineral] producing and producible lands subject to lease or permit would be continued [under the proposed 1960 amendments]. So also would the Taylor Grazing Act provision referred to above.

H.R. Rep. No. 2110, 86th Cong., 2d Sess. 2 (1960).

Thus, the 1958 amendments do not derogate from the Secretary's discretionary authority under Section 7. On the contrary, the committee reports accompanying the amendments show that the revision of the indemnity selection statute was not intended to affect the Secretary's role in classifying public lands as proper for release from grazing districts or from the withdrawal effected by Executive Order No. 6910. Were it only for the context and legislative history of the Taylor Grazing Act and the undeviating administrative practice for forty years, the Secretary's interpretation of Section 7 would be entitled to substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965). But when those factors are combined with explicit congressional recognition and approval of the Secretary's role in the indemnity selection process, it is difficult to appreciate how the court of appeals could be justified in reaching a different result. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 14. See

also *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1 23-24 (1976); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970).

II. APPLICATION OF THE SECRETARY'S "GROSSLY DISPARATE VALUE" STANDARD IN REVIEWING STATE INDEMNITY SELECTIONS OF MINERAL LANDS IS A PROPER EXERCISE OF THE DISCRETION CONFERRED BY SECTION 7 OF THE TAYLOR GRAZING ACT

After the 1958 amendments to the state indemnity selection statute, the Secretary faced the task of determining, under Section 7 of the Taylor Grazing Act, when to classify mineral lands as "proper for acquisition" in satisfaction of outstanding lieu rights. In particular, he needed to decide how to respond to state selections of high-value mineral lands in lieu of lost school lands that, although mineral in character, were worth substantially less. The remaining question presented in this case is whether the Secretary has permissibly exercised his discretion in declining to classify as available for indemnity selection mineral lands whose value is "grossly disparate" to that of the lost school sections they are intended to replace.

A. Nothing in the language of Section 7 purports to compel the Secretary to classify particular lands in a particular way or to limit the reasons for which he can refuse a requested classification. The phrase "in his discretion" at the beginning of the Section modifies all that follows. In cases not involving state indemnity selections, the courts have recognized that the Secretary enjoys broad discretion over the classi-

fication process. E.g., *Finch* v. *United States*, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); *Pallin* v. *United States*, 496 F.2d 27, 34 (9th Cir. 1974). And one court has expressly held that "the market value of the lands being classified" properly may be considered in the exercise of the "broad powers and manifold options" granted the Secretary by the Taylor Grazing Act. *Boothe* v. *Hickel*, 347 F. Supp. 1273, 1276 (D. Nev. 1969), aff'd sub nom. *Bronken* v. *Morton*, 473 F.2d 790, 797-798 (9th Cir.), cert. denied, 414 U.S. 828 (1973). The same approach should control here.

We may assume that the Secretary would be abusing his discretion if he refused to classify as available sufficient lands to satisfy outstanding state indemnity rights. So, also, he might be faulted if he approved selections only when the lieu lands were *less* valuable than the lost sections. But the Secretary cannot be charged with any such questionable action. The rule he has adopted is simply to insist on rough equivalence, permitting the states to gain a modest advantage but not an unconscionable one in the course of selecting mineral lands to replace lost school lands of mineral character. Nor is there any suggestion that the Secretary's policy prevents the states with outstanding selection rights from fully satisfying those rights and exercising a meaningful choice among lands in the public domain.

B. The Secretary's "grossly disparate value" formula is not inconsistent with the 1958 amendments to Sections 2275 and 2276 of the Revised Statutes (43 U.S.C. 851 and 852), which for the first time authorized the states to make indemnity selections of

mineral land. To be sure, the amendments contemplate the selection of "mineral land" in lieu of other, lost, "mineral land," and they do not change the "equal in acreage" principle that has long characterized indemnity selections under the Revised Statutes. As the Department of the Interior acknowledged in its report to Congress on the legislative proposal that became the 1958 Act, "in making indemnity selections[,] lands are taken on an equal acreage basis * * *." S. Rep. No. 1735, *supra*, at 8; H.R. Rep. No. 2347, *supra*, at 3. But the provisions of Sections 2275 and 2276 govern in-lieu selections only of "unappropriated" lands; lands that have been withdrawn or reserved may be selected only if the Secretary classifies them as proper for that purpose. Classification under Section 7 of the Taylor Grazing Act is thus a prerequisite to the application of the indemnity selection statute, and unless the Secretary's discretionary classification authority is meaningless, he cannot be bound to approve every selection that satisfies the criteria of Sections 2275 and 2276.

Moreover, the results produced by the Secretary's "disparate value" policy are fully in keeping with the intent of the Congress that enacted the 1958 amendments. Senator Watkins of Utah, a cosponsor of the measure, explained that, in granting school acreage to the states, "Congress specified the sections by number, to insure that the schools would be given a cross section of land value." 104 Cong. Rec. 11921 (1958). The prohibition against indemnity selection of mineral lands, Senator Watkins continued, par-

tially defeated the purpose of the school grants, because it prevented the states from obtaining the full cross-section to which they were entitled. The 1958 bill, he concluded, would "do[ ] nothing more than the Congress intended in the original grants under the respective enabling acts;" it would merely insure that the states receive "a fair cross section of land values." *Ibid.* In a similar vein, the House Committee reported that "[t]here appears to be little equity" in the restriction of indemnity selections to nonmineral lands, even where the lost school sections to be replaced were mineral. H.R. Rep. No. 2347, *supra*, at 2.

The Secretary's "grossly disparate value" policy thus helps to effectuate the congressional intent underlying the 1958 amendments. If states were permitted routinely to select mineral lands vastly more valuable than the school lands lost, the congressional purpose of guaranteeing a fair cross section of land values would not be served. As long as valuable mineral lands could be found in the public domain, states would receive a windfall for each section of low-value mineral school land appropriated before survey.

C. The classification rule applied to Utah in this case is not a novel deviation from previous practice. At least since 1965, the Department of the Interior has consistently followed a policy of refusing to classify as available for indemnity selection lands of

"grossly disparate value" to the lost acreage.[26] Nor is this a vague, undefined standard. The precise formula now employed was articulated in a memorandum approved by the Secretary of the Interior in January 1967 (A. 43-45). It states:

> If the estimated value of the "selected lands" is more than $100 per acre, then the values will not be considered grossly disparate if the value of the "selected lands" exceeds the value of the "base lands" by less than $100 per acre or by 25% of the value of the "base land," whichever is greater.[27]

And, here also, the Department's practice has won congressional approval.[28] In January 1974, Senator

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[26] The record contains an internal Department of the Interior memorandum, dated September 14, 1962, which states (A. 41) that "[i]n considering an application by a state for indemnity selection * * *, the disparity in values between the lands offered as base and the lands selected cannot be considered." The memorandum does not mention the Taylor Grazing Act or the Secretary's discretionary classification authority over withdrawn and grazing district land. It is doubtful whether the author of the memorandum, the Associate Solicitor of the Department's Division of Public Lands, accurately represented considered departmental policy even at the time the memorandum was written, but in any event no such policy has been in effect at any time since 1965.

[27] The formula does not exclude the exercise of discretion in appropriate cases. The memorandum further states:

> If such estimate exceeds these limits, the case will be submitted to Washington for evaluation of all the circumstances.

[28] The court of appeals (Pet. App. 20a) points to an incident in 1966 in which the Department of the Interior allegedly "withdrew" a proposed amendment to Sections 2275 and 2276

Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, joined by Senator Metcalf, the Chairman of the Subcommittee on Minerals, Materials and Fuels, wrote the Secretary of the Interior concerning the prototype oil-shale leasing program and its relation to state indemnity selections. On behalf of the Committee, the Senators expressed concern about the very applications involved in this case and endorsed the Department's policy of barring selections of grossly disparate value:

> There is one further complicating factor with respect to the Department's [oil-shale leasing]

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that would have ended all dispute over the legitimacy of the Secretary's consideration of comparative land values in reviewing state indemnity selections. In fact, the Department's report to the Senate Committee on Interior and Insular Affairs stated "a preference for legislation which included [the 'equal value'] concept, but indicated no objection to the enactment of a bill without it." S. Rep. No. 1213, 89th Cong., 2d Sess. 4 (1966). The Committee responded (*id.* at 2):

> The Department of the Interior * * * indicated it favored amendment of the bill to include an equal value concept with respect to lands valuable for leaseable minerals involved in State selections, in place of the acre-for-acre basis. The Department stated a preference for legislation with this concept, but indicated no objection to the enactment of the bill without it. The Senate committee, believing this issue extraneous to the specific purpose of [the bill under consideration], rejected such an amendment. However, the chairman of the full committee has suggested that the administration reexamine its position on the equal value concept, and make specific recommendations on that public land issue.

Plainly, this statement manifests no disapproval of the "grossly disparate value" policy under the Taylor Grazing Act, a policy placed in written form by the Bureau of Land Management and approved by the Secretary several months after the Senate report.

program. That is the pending State indemnity selection applications filed by the State of Utah, for 157,000 acres of Federal land in Utah. We understand that these selections include the two Utah tracts the Department intends to lease as part of the prototype program.

We are well aware of the longstanding controversy over selection of "mineral-rich" lands by the States in satisfaction of their statehood grants. We agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a "gross disparity" of value between the lost lands and the selected lands. If you intend to change that policy, we request that you notify this Committee before opening any "mineral-rich" lands to selection.

In any event, it seems to us that the Department should decide the state selection question before going ahead with the prototype program. It is our understanding that if the State of Utah takes title to these oil shale lands, that it intends to offer them for development. Any large scale development on these lands would appear totally inconsistent with the objectives of the Department's prototype program.[29]

In sum, the Secretary's determination to consider comparable land values in reviewing state indemnity selections does not flout the congressional decision to permit selection of mineral lands in appropriate cir-

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[29] *Oil Shale Leasing: Hearings on S. 2413 Before the Senate Subcomm. on Minerals, Materials and Fuels*, 94th Cong., 2d Sess. 26 (1976).

cumstances. Rather, insistence on rough value equivalence in lieu selections respects the legislative purpose of offering a fair replacement for lost grants, not an opportunity for profiteering. We may surmise that Congress left it to the Secretary to prevent abuses within the very wide limits left by the acre-for-acre and mineral-for-mineral guidelines. Certainly, the "grossly disparate value" policy is well within the discretion conferred by Section 7 of the Taylor Grazing Act. The courts below have misread the controlling provisions and failed to accord the weight due to well-established administrative practice, known to the Congress and expressly endorsed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1979

APPENDIX

STATUTES INVOLVED

1. *Utah Enabling Act*

Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109:

> That upon the admission of said State [of Utah] into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reser-

vation shall have been extinguished and such lands be restored to and become a part of the public domain.

2. *School Indemnity Selection Statutes*

Sections 2275 and 2276 of the Revised Statutes, as restated and revised by Sections 1 and 2 of Act of August 27, 1958, Pub. L. No. 85-771, 72 Stat. 928-929, and as thereafter amended, 43 U.S.C. 851-852:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes [43 U.S.C. 852], by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section [2276 of the Revised Statutes], by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in

lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section [2276 of the Revised Statutes], by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

SEC. 2276. (a) The lands appropriated by section 2275 of the Revised Statutes [43 U.S.C. 851], shall be selected from any unappropriated, surveyed or unsurveyed public lands within the

State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands, mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection.

(4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided,*

however, That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit

as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Notwithstanding the provisions of [the Act of September 27, 1944 (58 Stat. 748), as amended (43 U.S.C., sec. 282)] on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which

it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than [the said Act of September 27, 1944], or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d)(1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purpose of this section of the mineral character of lands lost to a State ~~shall~~ be made as of the date of application for selection and upon the basis of the best evidence vailable at that time.

3. *Taylor Grazing Act*

Section 1 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, as amended, 43 U.S.C. 315:

> In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage corps: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this subchapter nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this subchapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters

> within its jurisdiction. Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the conveient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this subchapter nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of title 16, for the purposes set forth in section 475 of title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secrestary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts

from all forms of entry of settlement. Nothing in this subchapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

Section 7 of the Act, 48 Stat. 1272, as amended by the Act of June 26, 1936, ch. 842, Section 2, 49 Stat. 1976, 43 U.S.C. 315f:

The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided,* That locations and entries under the mining laws including the Act

of February 25, 1920, as amended [30 U.S.C. 181 et seq.], may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided,* That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

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